BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD D. PAYNE Claimant	)	
VS.	)	
STAFFMARK EAST LLC Respondent	)	Docket No. 1,011,889
AND	)	
ATLANTIC MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 12, 2003 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found the claimant had sustained his burden of proof that the horseplay between claimant and a co-worker was conducted on such an ongoing basis that respondent should have been aware of the activity. Implicit in the award of compensation is the finding that respondent was aware of the activity and allowed it to continue.

The respondent requests review. At the two preliminary hearings held on this claim, the respondent argued that claimant and a co-employee were engaged in horseplay but that respondent was not aware of their activity. Because there is no evidence respondent was aware of the activity or condoned the activity respondent contends claimant has not met his burden of proof that his accidental injury arose out of his employment. Instead respondent argues claimant's injury was the result of horseplay.

Conversely, claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is undisputed that on July 9, 2003, claimant was kicked by Chay Rattana, a co-worker. Claimant blocked the kick, which was directed at his leg, with his hand and suffered a broken finger.

Initially, the claimant described the event as occurring after he questioned Mr. Rattana where he had been because lunch was over. Claimant denied touching Mr. Rattana and opined he was kicked for asking Mr. Rattana where he had been as well as commenting that lunch was over.

Claimant admitted that he knew horseplay was a prohibited conduct and that the day after the incident he signed a document titled Safety Policy Violation Warning which had horseplay written on it. Claimant further agreed that he admitted to Shannon Wright, respondent's director of inside operations for Kansas and Oklahoma, that he had been involved in horseplay when the accident occurred.

Mr. Rattana admitted that he kicked the claimant. He testified that after lunch as he had returned to his worksite the claimant touched him on the back. Mr. Rattana tried to kick claimant who jumped back. Claimant then tried to touch Mr. Rattana again and this time Mr. Rattana's kick caught claimant's finger. Mr. Rattana said he was not mad at claimant and the two were playing. He further testified that he and claimant played in this fashion practically every day during breaks or lunchtime. But Mr. Rattana said he had never told his supervisor about this activity.

Respondent contends that claimant's accident did not arise "out of" his employment, but instead occurred as a result of claimant's horseplay.

K.S.A. 44-501(a) (Furse 2000) states, in part:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

Arising "out of" the employment is defined as follows:

> An injury arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

> An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment.[1]

The Kansas Supreme Court has held that, for an accident to arise out of the employment, some causal connection must exist between the accidental injury and the employment.[2]

Injury caused by horseplay does not normally arise out of employment and is not compensable. But if it is shown that the horseplay has become a regular incident of the employment and is known to the employer then injuries suffered in such activities are compensable.[3]

The described game between claimant and Mr. Rattana was, in no way, an integral part of claimant's employment with respondent. The activity by claimant was merely a spontaneous act. There was no indication in the record that any of claimant's supervisors were even aware of the activity until after the accident had occurred. Based upon the evidence in this record, the Board cannot find that respondent had actual knowledge of this horseplay. Therefore, the Board finds claimant has not proven accidental injury arising out of his employment with respondent on the date alleged.

The Board finds there was no causal connection between the accidental injury and claimant's employment with respondent. The injury occurred as a result of claimant's horseplay and is, therefore, not compensable. Consequently, the Board finds that the ALJ's Order granting claimant benefits should be, and is hereby, reversed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated September 12, 2003, should be, and is hereby, reversed, and claimant is denied benefits as his injury occurred as the result of horseplay and did not, therefore, arise out of his employment with respondent.

IT IS SO ORDERED.

Dated this _____ day of November 2003.

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BOARD MEMBER

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[1] *Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973).

[2] *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

[3] See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 P. 372 (1919).

c: W. Walter Craig, Attorney for Claimant
Edward D. Heath Jr., Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director